

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In the Matter of

DOCKET FILE COPY ORIGINAL

Application by SBC Communications Inc.  
Southwestern Bell Telephone Company, and  
Southwestern Bell Communications Services, Inc.  
d/b/a/ Southwestern Bell Long Distance for Provision  
of In-Region InterLATA Services in Oklahoma

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) CC Docket No. 97-121  
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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

**COMMENTS OF DOBSON WIRELESS, INC.  
IN OPPOSITION TO SBC COMMUNICATIONS INC.'S APPLICATION  
FOR SECTION 271 AUTHORIZATION IN OKLAHOMA**

Dobson Wireless, Inc. ("Dobson") submits these comments in opposition to the application filed by SBC Communications, Inc., Southwestern Bell Telephone Company ("SWBT") and Southwestern Bell Communications Services, Inc. for in-region, interLATA authority in Oklahoma under section 271 of the Telecommunications Act of 1996.<sup>1</sup> Dobson presently offers cellular telephone service in Oklahoma and elsewhere. Dobson is certificated to provide local exchange service in Oklahoma, and has an approved resale agreement with SWBT pursuant to which it plans to offer local exchange services on an exclusively resale basis to residential and business subscribers. Dobson also commenced negotiations on December 13, 1996 for an interconnection agreement with SWBT. Once this agreement is signed and Dobson obtains the necessary physical collocation (also the subject of current negotiations), Dobson plans to offer facilities-based local telecommunications service to business subscribers in

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<sup>1</sup> For the sake of convenience, we shall use "SBC" to refer to all three applicants as a group.

*ATC*

SWBT's exchanges in Oklahoma City and Tulsa and surrounding areas.

Dobson has previously submitted comments in support of the Motion to Dismiss filed by ALTS. We now set forth additional reasons why SBC's application must be denied.

**I. SBC HAS NOT COMPLIED WITH THE PRICING ELEMENT OF THE CHECKLIST.**

**A. SBC Has Not Established That SWBT's Rates for Unbundled Elements Are Just and Reasonable and Based on Cost.**

The competitive checklist requires the RBOC to provide interconnection and access in accordance with the requirements of sections 251(c)(2), 251(c)(3) and 252(d)(1) of the Act. See § 271(c)(2)(A)(ii), (B)(i), (B)(ii). Sections 251(c)(2), 251(c)(3) and 252(d)(1) require the incumbent carriers to provide interconnection and access to network elements at "just and reasonable" rates. "Just and reasonable" must be "based on the cost . . . of providing the interconnection or network element." § 252(d)(1)(A)(i). To date, there has been no finding by the Oklahoma Corporation Commission or this Commission that the interconnection and rates charged by SWBT are "just and reasonable" and "based on cost," and SBC has made no showing on which this Commission could make such a finding. Accordingly, there is no basis for a finding of compliance with the crucial pricing element of the competitive checklist.

SWBT is charging the interim rates approved by the Oklahoma Commission in the AT&T Arbitration. Cause No. PUD 960000218 (App. Vol. III Tab 9). In that arbitration, the Oklahoma Commission adopted the Arbitrator's findings on the issue of interim rates for unbundled elements. Id., Commission's Order at p. 4. In the proceedings before the Arbitrator,

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AT&T and SWBT had proposed different rates, based on differing cost study submissions. The Arbitrator's decision made no determination of appropriate costs to support the rates to be charged competitors:

**Findings and Recommendations:** The Arbitrator does not recommend any particular methodology or cost study be adopted at this time. The Arbitrator does adopt SWBT's proposed rates on the basis that if a true-up is needed in the future it would be easier to explain to customers rather than trying to explain a lower price being true-up to a higher price.

Id., Report and Recommendations of the Arbitrator at p. 20 (emphasis added). The underscored language was the sole basis on which the Arbitrator, with the Oklahoma Commission's subsequent approval, established the rates that SWBT will charge. Neither the Arbitrator nor the Commission made any finding whether the rates approved were just and reasonable or based on cost.

SBC may argue that the Oklahoma Commission's decision is binding on this Commission on the issue of conformity of the interim rates with the requirements of sections 251 and 252. There is no legal basis for such an argument. The Oklahoma Commission was establishing interim rates only, and for that purpose may well have had a valid equitable basis for deciding interim rates without cost data. But such an interim decision is not a sufficient basis for deciding the issue of interLATA entry, which will be a permanent rather than an interim decision. Under the relaxed standards of proof applicable to interim decisions, it may be that the Oklahoma Commission's exclusive reliance on equitable considerations relating to the true-up process was sufficient. But it is not sufficient for the decision of whether SBC is to be granted

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entry to the interLATA market -- a decision which will not be interim, but rather will be effectively irreversible once made.

As this Commission has pointed out, where the purpose of a proceeding is to set interim rates only and adequate cost studies do not exist, State Commissions may take action on the basis of less than adequate data. First Report and Order, ¶ 767. Judicial decisions also hold that where a regulatory commission lacks adequate cost data and is setting interim rates only, it may approve rates not affirmatively found to be unlawful, provided its approval is limited to a “reasonable interim period” pending establishment of a “more permanent rate structure.” MCI Telecommunications Corp. v. FCC, 712 F.2d 517, 535 (D.C. Cir. 1983).

However valid this approach may be for an “interim” decision, it does not suffice where the issue is the terms and conditions of RBOC entry into the interLATA market. SBC is not asking for “interim” entry. If SBC’s application is granted, the decision will be permanent for all practical purposes. Accordingly, before the Commission may approve interLATA entry, there must first be a determination that access and interconnection rates in Oklahoma are just and reasonable and based on cost, as required by the Act. For this purpose, the decision of the Oklahoma Commission -- based solely on the Arbitrator’s assessment of the relative equities of “truing up” as opposed to “truing down” -- does not substitute for a finding based on cost.

Judicial decisions also support the conclusion that a party cannot obtain the benefit of a prior administrative or judicial decision, in a subsequent case where the party “has a significantly heavier burden than he had in the first action.” Restatement (Second) of Judgments, § 28(4).

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Here, SBC has the burden of establishing compliance with the pricing element of the competitive checklist, by showing that SWBT's access and interconnection rates are just and reasonable and based on cost. In the interim rate arbitration, all the Oklahoma Commission required SBC to show was the relative equities of truing up interim rates in one direction or another. While that may have been adequate in the context of interim rates, it is not a basis for allowing interLATA entry.

Nor can SBC argue that the opportunity for some future, as-yet undetermined true-up, once permanent rates are set, establishes that the interim interconnection and access rates are "just and reasonable." Section 271 requires that the RBOC seeking interLATA authority must comply with the checklist when it gets the authority. A commitment to do so at some future date is not sufficient. Competitive carriers seeking entry into the local market need to make decisions on the basis of the rates presently in effect. The prospect of a true-up at some uncertain future date, in some uncertain amount, is simply not a basis for the type of investment decisions that have to be made in order to establish significant, facilities-based competition.

**B. SBC Has Not Established That SWBT's Rates for Physical Collocation Are Just and Reasonable and Based on Cost.**

There is another respect in which the SBC application fails to meet the pricing element of the checklist. Section 251(c)(6) requires the LECs to provide physical collocation at "just and reasonable" rates. That is part of the LECs' obligation to provide interconnection and access to

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network elements, which is part of the competitive checklist.<sup>2</sup> In the AT&T arbitration, the Oklahoma Commission approved the Arbitrator's recommendation that "the Commission permit SWBT to price its physical collocation arrangements on a case-by-case basis," reflecting "the cost to implement the requested arrangement plus an allocation of shared costs based on the usage of different occupants." Cause No. PUD 960000218, Report and Recommendation of the Arbitrator at p. 13; App. Vol. III Tab 9. SWBT's statement of generally available terms and conditions simply requires it to provide physical collocation in accordance with the Commission's decision in the AT&T arbitration. App. Vol. II Tab 1 § IIB (SGAT -- see also App. NIM of STC, Art. IV pp. 8-9 (Model Physical Collocation Agreement, which leaves rates blank)); App. III Tab 3.

In response to its request for collocation at the Oklahoma City "Central" Central Office, Dobson has been presented with a quote of \$70,752 "upfront payment" plus a monthly charge of \$1400. Since the quote is offered as valid for 45 days only on a "take it or leave it" basis, and

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<sup>2</sup> Sections 271(c)(2)(B)(i) and (ii) of the competitive checklist include the obligation to provide interconnection and access in accordance with sections 251(c)(2) and (c)(3), which incorporate "the requirements of this section." "This section" includes the collocation provision of section 251(c)(6).

since Dobson cannot begin to do significant business in Oklahoma City until it is collocated at this Central Office, it may have to swallow what seems like an outrageous quote for supplying a 100-square foot cage in an area shared with two other collocating carriers.<sup>3</sup> In any event, regardless of the reasonableness of this quote (which neither Dobson nor the Commission is in the position to assess on the present record), the collocation situation reinforces the conclusion that SBC has not yet demonstrated compliance with the pricing element of the competitive checklist.<sup>4</sup>

## **II. INTERLATA AUTHORIZATION FOR SBC IN OKLAHOMA WOULD BE CONTRARY TO THE PUBLIC INTEREST.**

Section 271(d)(3)(C) of the 1996 Act requires the Commission, before granting interLATA authorization, to find that the BOC complies with the competitive checklist “and” that interLATA authorization is “consistent with the public interest, convenience, and necessity.” The legislative history makes it clear that Congress’ use of “and” was intentional: there was a clear Congressional intent that compliance with the checklist would not be enough -- that interLATA authorization required a “public interest” finding in addition to checklist compliance.

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<sup>3</sup> SWBT’s quote, dated April 11, 1997, is attached.

<sup>4</sup> SWBT’s collocation quote was accompanied by several pages of pricing data which, we believe, supports our view that the quote is excessive. However, the data is marked proprietary, and the confidentiality agreement which SWBT required Dobson to execute to initiate interconnection negotiations precludes its disclosure, unless such disclosure is required by law, including, but not limited to, in response to subpoenas and/or orders of a governmental agency or court of competent jurisdiction. In any event, it is SBC’s burden, not Dobson’s, to show that its collocation charges are just and reasonable and based on cost.

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Accordingly, even if SBC had complied with the checklist (and we do not believe it has), it is not entitled to interLATA authorization absent a “public interest” finding.<sup>5</sup>

The specific content of the “public interest” standard is illuminated by section 271(d)(2)(A), which requires the Commission to consult with the Attorney General. Consultation with the Attorney General serves as a basis for assessing competitive considerations, which are pertinent to the “public interest” determination. The legislative history establishes that Congress expected one basis for assessing competitive considerations to be section VIII(C) of the MFJ -- which adopts the standard of whether there is no substantial possibility that the BOC or its affiliates could use monopoly power in the local exchange market to impede competition in the interLATA market. House Conf. Rep. No. 104-458, 104th Cong. 2d Sess. at 149. The MFJ standard required an assessment of competitive conditions in the local market, to determine whether the BOC continued to possess “bottleneck” monopoly power that it could leverage into market power in the interLATA market. United States v. Western Electric

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<sup>5</sup> The Senate bill contained the requirement of a “public interest” finding. S. 652, § 255(c)(2). This was criticized on the ground that the “Bell companies having satisfied the ‘competitive checklist,’ they should be allowed to compete then, not at some indefinite future time. Their ability to compete should also not be subject to an ill-defined ‘public interest’ finding by the Federal Communications Commission.” S. Rep. No. 23, 104th Cong. 1st Sess. at 62 (Additional Views of Senator Burns)(emphasis added). By contrast, the House bill contained no public interest test, and was criticized on the ground that it might allow interLATA entry by the regional Bells before there is “real competition in the local business and residential markets.” 141 Cong. Rec. H8458 (daily ed. Aug. 4, 1995)(Rep. Bunning). The Conference Committee, in light of these conflicting concerns, opted for the Senate’s “public interest” provision. House Conf. Rep. No. 458, 104th Cong. 1st Sess. at 161.



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Co., 673 F. Supp. 525 (D.D.C. 1987), aff'd 900 F.2d 283 (D.C. Cir. 1990).

At present, competition has made only a minuscule dent in SBC's bottleneck control of the local exchange market in Oklahoma. There is currently no competitive residential service in Oklahoma available to the general public. Competitors' sales to business subscribers are a tiny percentage of local exchange revenue in Oklahoma, and there are large areas of the State where there is no competitive presence. Even the competitors presently in the market are overwhelmingly dependent on reselling SWBT services or utilizing SWBT's network. Unless and until competitors lose that dependence and acquire more than just a token presence in the market, the local exchange market cannot be determined to be sufficiently competitive to break the local exchange "bottleneck."

Moreover, as previously described, the interconnection rates in Oklahoma are the rates proposed by SWBT, with the Oklahoma Commission having made no determination that these rates are just and reasonable and based on cost. That determination will not be made until completion of the proceeding to establish permanent rates. Until that proceeding is completed, potential competitors cannot know what their costs will be, and if they make their business decisions on the basis of the present interim rates, they may well be relying on rates later found to be grossly in excess of a level consistent with a competitive market.

SBC argues that the actual level of competition in Oklahoma is irrelevant for purposes of section 271, as long as the competitive door is open. For the reasons stated, that argument is wrong: the statutory "public interest" test incorporates the concept of "bottleneck" monopoly

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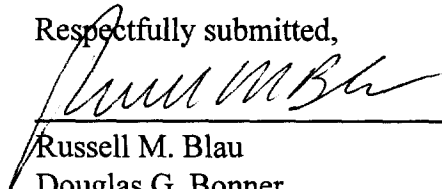
power, and as long as SWBT has all the residential local exchange business in the State, and all but a token amount of the commercial local exchange business, it has a "bottleneck" monopoly.

Moreover, until interconnection rates are determined to be just and reasonable and based on cost, and facilities-based competitors are able to obtain collocation at cost-based rates, it cannot be determined that the competitive door is truly open. At this point, SBC's cooperation is still needed to establish a true competitive local exchange market in Oklahoma -- both in establishing the final interconnection rates (where SBC controls the cost data that must be utilized), and in establishing reasonable terms for collocation. But the only real incentive for SBC to provide such cooperation is the knowledge that it must do so to gain interLATA authorization. It would not be in the public interest to remove that incentive at a point where local exchange competition in Oklahoma has barely started.

**CONCLUSION**

For the reasons stated above and in Dobson's Comments in Support of ALTS's Motion to Dismiss, SBC's application for in-region interLATA authority in Oklahoma should be denied.

Respectfully submitted,



Russell M. Blau

Douglas G. Bonner

Robert V. Zener

SWIDLER & BERLIN, CHARTERED

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Washington, DC 20007-5116

202-424-7500

May 1, 1997

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Attachment

Southwestern Bell Physical Collocation Quote

Deanna Sheffield  
Account Manager-  
Competitive Provider  
Account Team

Southwestern Bell Telephone  
One Bell Plaza  
Room 0525.01  
Dallas, Texas 75202  
Phone 214 464-5062  
Fax 214 464-1486

(C) Southwestern Bell

April 11, 1997

Mr. Jeff Brzozowski  
Dobson Wireless  
13439 N. Broadway Ext., Suite 200  
Oklahoma City, OK 73114

Dear Jeff:

This is a *revised* quote for Dobson's physical collocation request for the Southwestern Bell Telephone (SWBT) Oklahoma City 'Central' Central Office. You will find a revised copy of Exhibit 2 of the Physical Collocation Agreement, 'Construction Cost Summary for Physical Collocation' as well as the details of the pricing estimate. This revised quote is valid for 45 days from the date of this letter. Thereafter, a new quote would be necessary.

The revisions in the quote are all pricing related. The primary revision was to the common charges. As stated in the proposed physical collocation agreement, common charges are shared amongst all collocators in a particular CO. SWBT now has 2 jobs in progress for 2 collocators in the OKC Central CO, and thus Dobson is now the third collocator rather than the second, thereby reducing Dobson's share of common costs from 50% to 33.33%. The net effect of this revision was to reduce the common charges from \$28,200 to \$18,798. Please remember that these costs are only estimates at this time, and will be subject to true-up at the time of job completion.

The other pricing revisions amounted to a \$6.00 per month reduction in the Collocator space monthly rental cost. The revisions were based on a 5 year contract vs. the 10 year contract originally quoted in error, and a calculation of the current power drain at 50 amps vs. 90 amps (Dobson's 3 year forecast) that was originally quoted.

SWBT expects that the interval for this project will remain 98 days from SWBT's receipt of the check for 50% of the preparation charges, the original signed quotation letter, dated March 29, 1997, and the signed physical collocation agreement.

Should you have any questions, please call me.

Sincerely,

Deanna Sheffield

Enclosures

Exhibit 2

CONSTRUCTION COST SUMMARY FOR PHYSICAL COLLOCATION

CUSTOMER: DOBSON WIRELESS  
LOCATION: OKLAHOMA CITY - CENTRAL  
CASE NO: OK022497009P  
ACNA: DOB  
CLI: OKCYOKCEHF1

CONSTRUCTION COSTS TO PROVIDE:  
FOR PHYSICAL COLLOCATION IN:

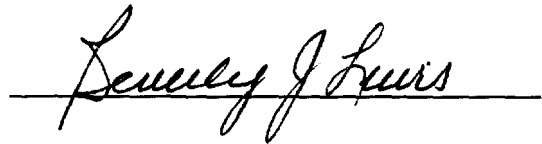
100 SQ. FT. CAGE  
CENTRAL CENTRAL OFFICE

COMMON WORK	\$	18,798.00
SPECIFIC WORK	\$	14,600.00
COST OF EQUIPMENT	\$	34,544.00
COST OF PULLING CABLE	\$	2,810.00
<b>TOTAL UPFRONT PAYMENT</b>	<b>\$</b>	<b>70,752.00</b>
50% of Preparation Charges due prior to construction	\$	35,376.00
(Note: Subcontractor Charges = \$ 67,942.00 )		

MONTHLY COST FOR EQUIPMENT	\$	198.47
MONTHLY COST FOR CONDUIT	\$	18.00
(Conduit cost/foot = \$8.05 X 300 ft. in cable run)		
COLLOCATOR SPACE MONTHLY RENTAL COST	\$	414.00
(Cost/Avg. Sq. Ft. = \$4.14 X 100 sq. ft. cage)		
COLLOCATOR SPACE MONTHLY POWER COST	\$	773.00
(Cost/Amp. = \$15.46 X 50 # of amps requested)		
<b>TOTAL MONTHLY COST</b>	<b>\$</b>	<b>1,401.47</b>

Certificate of Service

I hereby certify that copies of the foregoing Comments of Dobson Wireless, Inc. in Opposition to SBC Communications Inc.'s Application for Section 271 Authorization in Oklahoma were served this 1st day of May, 1997, to each on the attached service list, either by hand delivery (as indicated by an asterisk (\*)) or by first class mail.

A handwritten signature in cursive script, reading "Beverly J. Lewis", is written over a horizontal line.

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